No. 11144

IN THE

United States Circuit Court of Appeals

For The Ninth Circuit

PETER L. YOUNG,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

Upon Appeal from the Supreme Court of the Territory of Hawaii

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ANSWER TO SUPPLEMENTAL BRIEF FOR APPELLANT

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Index

Table of Authorities Cited

Cases

Statutes

Other Authorities

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INTRODUCTION

At the oral argument held in this Court, August 30, 1946, the appellant was granted permission to file a Supplemental Brief on (1) the jurisdiction of this Court to entertain the appeal, and (2) the subject of reasonable doubt. The Territory was granted permission to file a reply to the Supplemental Brief for Appellant.

ARGUMENT

1. **THE APPELLANT HAS NOT SHOWN THAT THIS COURT HAS OR SHOULD TAKE JURISDICTION OF THIS CASE UNDER SECTION 128 OF THE JUDICIAL CODE, AMENDED, (28 U.S.C.A. SEC. 225).**

Section 128 of the Judicial Code, Amended, (28 U.S.C.A. Sec. 225) provides in part:

"(a) . . . The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

Fourth. In the Supreme Courts of the Territory of Hawaii . . ., in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000, and in all habeas corpus proceedings."

There is no question that the constitutional guarantees of the federal Bill of Rights are applicable to the Territory of Hawaii including the "due process" clause of the Fifth Amendment. (Territory's Answering Brief, pp. 11-12; Supplemental Brief for Appellant, p. 2.)

(a) THIS CASE DOES NOT INVOLVE THE "DUE PROCESS" CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OR ANY FEDERAL QUESTION.

We pointed out in Territory's Answering Brief, pages 12-13, that the "due process" clause of the Fifth and Fourteenth Amendments mean the same thing except the Fifth Amendment applies to the federal government and its instrumentalities while the Fourteenth Amendment applies to the several states.

Material error in an instruction to the jury in a criminal case in a territorial court does not violate the "due process" clause of the Fifth Amendment.

Buchalter v. New York (1943), 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492, 1495-1496. (cited on pp. 16-17, Territory's Answering Brief.)

Davis v. State of Texas (1891), 139 U.S. 651, 11 S. Ct. 675, 35 L. Ed. 300. (cited on page 17, Territory's Answering Brief.)

"*Due Process of Law*" by Taylor, Section 551, p. 824. (cited on pp. 17-18, Territory's Answering Brief.)

In *Buchalter v. New York (1843), supra,* the Supreme Court of the United States defines "due process" and the law applicable herein at pages 1495-1496:

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.' Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. But the Amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the states free to enforce their criminal laws under such statutory provisions and *common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court.*" (Emphasis ours.)

Again at *page 1496,* we find the following:

> ". . . As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted *more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings.*" (Emphasis ours.)

In *Walker v. Sauvinet,* 92 U.S. 90, 23 L. Ed. 678, the Court states at *page 679:*

> "The States, so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State Courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings."

In *Collins v. Johnston,* 237 U. S. 502, 35 S. Ct. 649, 59 L. Ed. 1071 at 1077-1078, the Court states:

> ". . . He contends that he was deprived of due process of law, in violation of the 14th Amendment, in that the trial court arbitrarily denied and refused to consider a valid and legally conclusive defense offered by him upon the trial of the second indict-

ment, which resulted in the conviction upon which he is now held in custody. . . .

Nor are we able to see that the refusal of the proffered defense, even were such refusal erroneous, could at all affect the jurisdiction of the court, or amount to more than an error committed in the exercise of jurisdiction."

In *Frank v. Mangum*, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969, the Court states at *page 979:*

"As to the 'due process of law' that is required by the 14th Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense." (citing authorities.)

Again the Court states in reference to "due process" at *page 983:*

". . . This familiar phrase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases."

Again at *page 986:*

". . . In adopting it, the state declares in effect, as it reasonably may declare, that the right of the accused to be present at the reception of the verdict is but an incident of the right of trial by jury; *and since the state may, without infringing the 14th Amendment, abolish trial by jury, it may limit the effect to be given to an error* respecting one of the incidents of such trial." (Emphasis ours.)

In *Caldwell v. Texas,* 137 U.S. 692, 11 S. Ct. 224, 34 L. Ed. 816, the Court states at *818:*

"By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent Com. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank of Columbia v. Okely,* 17 U.S. 4 Wheat. 235, 244. . . . The power of the State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary. *Hurtado v. California,* 110 U.S. 516, 535. . . . No question of repugnancy to the Federal Constitution can be fairly said to arise when the inquiry of the state courts is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and the statutes authorizing the form

of indictment pursued are not obviously violative of the fundamental principles above adverted to."

In *Leeper v. State of Texas,* 139 U.S. 462, 11 S. Ct. 577, 35 L. Ed. 225, at *page 227,* the Court states:

"The sufficiency of the indictment, the degree of the offense charged, the admissibility of the testimony objected to and the alleged disqualification of the juror because he was not a freeholder were all matters with the disposition of which, as exhibited by this record, we have nothing to do."

(b) THE "CONSTITUTION OR A STATUTE OR TREATY OF THE UNITED STATES OR ANY AUTHORITY EXERCISED THEREUNDER" WAS NOT "INVOLVED" IN THIS CASE.

In order that a federal question be "involved" as required by *Section 128 of the Judicial Code, Amended, (28 U.S.C.A. Sec. 225),* herein, such question must be presented in either the trial court or the Supreme Court of the Territory of Hawaii. The first time such question was raised was in this Court.

In *Brown v. Missouri K. & T. Ry. Co.,* 175 Mo. 185, 74 S.W. 973, the Supreme Court of Missouri states at *page 974:*

"But in order that the case can involve a constitutional question, the protection of the Constitution must be timely and properly invoked in the trial court, and that protection must have been denied to the party invoking it by that court, and such party must have been the losing party in the trial court, and proper exceptions saved to the ruling of the trial court. (citing authorities.) The

constitutional protection must be properly invoked in the trial court. It cannot be invoked for the first time in an appellate court. (citing authorities.)

Unless the constitutionality of an act under which the proceeding is had is expressly challenged in the trial court, and the challenge overruled by the trial court, and exception saved in that court, and unless the challenging party is the losing party in the lower court, the appeal will lie to the Court of Appeals, and not to this court, and the Court of Appeals must decide the case without any regard whatever to the constitutional question, for in such a state of the record there is no constitutional question involved in the case. If neither party raises a constitutional question, then the case will be decided by the appellate court that has jurisdiction of the appeal on other grounds, the same as if it had not been possible to raise a constitutional question. *In short, a constitutional question must be raised before it can be involved, and, if it is not involved, then the decision of the case can decide no such question.*" (Emphasis ours.)

See also: *Moore v. Missouri,* 159 U.S. 673, 679-680, 16 S. Ct. 179, 40 L. Ed. 301.

(c) THE PHRASE "OR ANY AUTHORITY EXERCISED THEREUNDER IS INVOLVED" USED IN SECTION 128 OF THE JUDICIAL CODE, AMENDED, (28 U.S.C.A. SEC. 225), DOES NOT INCLUDE ALL QUESTIONS DECIDED BY THE SUPREME COURT OF THE TERRITORY BECAUSE SAID COURT EXISTS BY VIRTUE OF AN ACT OF CONGRESS, TO WIT: SECTION 81 OF THE ORGANIC ACT OF THE TERRITORY (48 U.S.C.A. SEC. 631).

If the foregoing were not true then Congress would not have deemed it necessary to expressly provide for appeals in criminal cases "wherein the Constitution or

a statute or treaty of the United States or any authority exercised thereunder is involved." (28 U.S.C.A. Sec. 225.)

Our territorial Supreme Court might render a decision contrary to the "due-process clause" under the Bill of Rights but if that question had not been expressly raised by the appellant in the Supreme Court of the Territory the right to appeal would not exist as pointed out in Point 1 (b) in pages 7 to 8 of this memoradum. Neither the *Waialua Agricultural Company v. Christian,* 305 U.S. 91, 109, 59 S. Ct. 21, 83 L. Ed. 60, nor *Duncan v. Kahanamoku,* 324, U.S. 833, 66 S. Ct. 606, 631, 89 L. Ed. 1398, cited in Supplemental Brief for Appellant, page 4, applies to the facts presented in the case at bar.

Brown v. Missouri K. & T. Ry. Co., supra, 175 Mo. 185, 74 S.W. 973, 974.

Moore v. Missouri, supra, 159 U.S. 673, 679-680, 16 S. Ct. 179, 40 L. Ed. 301.

Assuming arguendo that the appellant was denied "due process of law" by the decision of the Supreme Court of the Territory of Hawaii in this case would not in and of itself give this Court jurisdiction. The two cases of *Farrington v. Tokushige,* 273 U.S. 284, 298, 299, 47 S. Ct. 406, 71 L. Ed. 646, and *Lovato v. New Mexico,* 24 U.S. 199, 37 S. Ct. 107, 61 L. Ed.

244, cited on page 2 of Supplemental Brief for Appellant to the effect that if the decision of the territorial Supreme Court denied "due process" that would give this court jurisdiction, do not so hold. In the *Lovato case,* the Court states at *page 247:*

> "As the case was tried in a territorial court, the denial of asserted rights based upon the 5th and 6th Amendments presents questions within our jurisdiction."

The language in the Lovato case must be construed in the light of the facts presented there, and of the two "asserted rights" therein mentioned. One was expressly raised in the trial court and the other in the state supreme court but both were based on constitutional grounds and argued on such grounds before the state court.

Appellant in his Supplemental Brief, at page 3, quotes:

> " 'Due process of law' contemplates a trial in a criminal case by a fair jury with full evidence and correct instructions as to the law. *Henderson v. State,* Fla., 20 So. 2d 659, (649), 661 (651)."

But on this point the Supreme Court of the United States has ruled to the contrary in *Buchalter v. New York* (1943), 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492, 1495-1496.

see also: *Davis v. State of Texas, supra,* 139 U.S. 651, 11 S. Ct. 675, 35 L. Ed. 300.

"*Due Process of Law*" by Taylor, supra, Section 551, p. 824.

Appellant states on page 3 of his Brief: "In criminal cases, 'due process of law' contemplates proper instructions on reasonable doubt." He cites *Howard v. Fleming,* 191 U.S. 126, 24 S. Ct. 49-51, 48 L. Ed. 121. On the contrary this case merely held that the "due process" clause of the Fourteenth Amendment was not violated by a failure of a state court to instruct a jury in a criminal case on the presumption of innocence.

Appellant also states on page 3 of his Brief: "In criminal cases, 'due process of law' is denied by instructions which set at naught the established principles of reasonable doubt." He again cites *Howard v. Fleming,* 191 U.S. 126, 24 S. Ct. 49, 50, 51, 48 L. Ed. 121, and in addition thereto cites *Chaffee v. United States,* 85 U.S. 516, 545, 21 L. Ed. 909, 914, and *Paddock v. United States,* 79 F. (2d) 872, 877. These last two cases do not discuss the question of "due process" at all.

2. ASSUMING ARGUENDO THAT A FEDERAL QUESTION IS INVOLVED HEREIN, THE WRIT OF ERROR SHOULD BE DISMISSED BECAUSE SUCH FEDERAL QUESTION IS NOT SUBSTANTIAL.

On this point we wish to refer the Court not only to the cases cited on page 18 of Territory's Answering Brief but also to all the federal cases cited therein from pages 19 to 39, both inclusive.

In *Hopt v. Utah,* 120 U.S. 430, 439-441, 7 S. Ct. 614, 30 L. Ed. 708, the Supreme Court of the United States upheld an instruction on reasonable doubt which contained the words:

> "That *a reasonable doubt is a doubt based on reason,* and which is reasonable in view of all the evidence." (Emphasis ours.)

3. THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII, DID NOT ERR IN GIVING TO THE JURY TERRITORY'S INSTRUCTION NO. 9, ON REASONABLE DOUBT.

The instruction in controversy reads as follows and the portion in italics indicates the part involved in this appeal:

"TERRITORY'S INSTRUCTION NO. 9

> I further instruct you that the burden of proof is upon the Territory and the law presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proves him guilty to your satisfaction and beyond a reasonable doubt. And in this connection, I instruct you that the doubt which will entitle the

defendant to an acquittal must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, but a *doubt that you could give a reason for.*

A reasonable doubt is not a slight doubt, not a probable doubt, not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs and depending upon mortal evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. The real question is whether after hearing the evidence and from the evidence you have or have not an abiding belief, amounting to a moral certainty that the defendant is guilty and if you have such belief so formed, it is is your duty to convict and if you have not such belief so formed it is your duty to acquit." (Record pp. 8-9.) (Emphasis ours.)

This Court, during the oral argument of its own motion, raised the question of the effect of the term "probable" used in the instruction.

This Court in *Hargreaves v. United States,* (CCA 9), 75 F (2d) 68, at *page 73* states:

"It is a well-settled principle of law that in determining the correctness of instructions, detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context." (citing authorities.)

See also: *Morrissey v. United States,* (CCA 9), 67 F (2d) 267, 273.

We have already shown in Territory's Answering Brief, pages 19-55, by the overwhelming weight of authority, both federal and state, including the decisions of this Court, that the term ". . . but a doubt you can give a reason for . . .," does not constitute error.

The appellant in his Supplemental Brief has not controverted this fact in any way but in effect claims that the use of the word "probable doubt" contained in the second paragraph of Instruction No. 9 may be a reasonable doubt and constitute a reversible error.

This again isolates a phrase of a single instruction without considering that phrase in relation to the balance of the instruction. The phrase as used in the instruction in controversy implies a "doubt" similar to a slight, possible or imaginary doubt and nothing else, and is intended to illustrate that absolute certainty of guilt can not be achieved and is not, therefore, required by law.

A fair reading and analysis of this instruction show in clear and unmistakable language that:

(1) The burden of proof is upon the Territory to prove the defendant guilty beyond a reasonable doubt.

(2) The defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, and

(3) The definition of a reasonable doubt is according to the classical definition of Justice Shaw in *Commonwealth v. Webster,* 5 Cush. (Mass.) 295, at page 320. Thus, the term "probable doubt," considering the whole instruction could not in any way have misled or confused the jury.

In *People v. Lee Sare Bo,* 72 Cal. 623, 14 Pac. 310, the Supreme Court of California stated at *page 312:*

> "3. In the charge to the jury the court, speaking on the subject of reasonable doubt, gave Mr. Chief Justice Shaw's definition thereof, which has been so often approved here, but, unfortunately, threw in this meaningless expression: '*But mere probabilities of innocence or doubts, however reasonable, which beset some minds on all occasions should not prevent such a verdict.*' What the court meant by mere probabilities of innocence or doubts which beset some minds on all occasions, in view of the correct and unambiguous language of the charge upon the same matter before and after this expression it is difficult to conjecture; but from the language following it would appear that the court desired to say to the jury that mere chimerical or fanciful doubts should not prevent a verdict if they were satisfied to a moral certainty of the guilt of the defendant. The court went on to say: 'In other words, gentlemen, a reasonable doubt, in a legal sense, is a doubt which has some reason for its basis; it is not a doubt arising from mere caprice or groundless conjecture, but it must arise from the facts proven in the case. You have no right to go outside of the evidence to hunt for doubts, nor

should you entertain those which are merely chimerical, or based on groundless conjectures.

It is that state of the case which, after an entire consideration and comparison of all the evidence, leaves your minds in that condition that you cannot say you feel an abiding conviction, to a moral certainty, of the truth of the charge. . . . The hypothesis contended for by the people must be established to an absolute certainty, to the entire exclusion of any rational probability of any other hypothesis being true, and, if a reasonable doubt is entertained by the jury on any material fact in the case, they should acquit.' The language of the sentence to which this objection is addressed is so ambiguous, and the charge in other portions so strong and clear on the question of reasonable doubt, we think the jury could not have been misled." (Emphasis ours.)

In *53 American Jurisprudence, Trial, Section 842, p. 618*, we find the rule stated:

"Construction as a Whole.—In considering the correctness and adequacy of a charge to the jury, it should be taken as a whole and read in its entirety; that is, each instruction must be considered in connection with others of the series referring to the same subject and connected therewith, and if, when taken together, they properly express the law as applicable to the particular case, there is no just ground of complaint, even though an isolated and detached clause is in itself inaccurate, ambiguous, incomplete, or otherwise subject to criticism. The rule is applicable in both civil and criminal cases."

In *Peters v. United States*, (CCA 9), 94 F 127, 146, we find:

"The charge must be read and considered in its entirety; . . ."

In *Colt v. United States,* (CCA 8), 190 F 305, 308, the Court states:

> "But the correctness of a charge is not to be determined upon excerpts taken therefrom, and considered apart from other portions bearing upon the same subject. The charge as a whole upon that question must be considered. So considered it cannot be successfully contended that the charge in question is erroneous."

This case was cited with approval in *Hargreaves v. United States,* (CCA 9), 75 F (2d) 68, 73.

Considering all the instructions on reasonable doubt given by the trial court in the case at bar the appellant was fully protected and the jury was not misled or confused by Territory's Instruction No. 9, either in the use of the phrase "a doubt that you could give a reason for" or the phrase "not a probable doubt."

The court, in addition to Territory's Instruction No. 9 gave the following instructions for appellants on reasonable doubt, to wit:

"DEFENDANT'S INSTRUCTION NO. 2

> I instruct you that the issue which you are to try is that presented by the indictment, and the defendant's plea of not guilty in this case. For be it remembered that the plea of not guilty puts in issue and requires the *prosecution to prove each and every material allegation in the indictment beyond*

all reasonable doubt." (Record p. 10.) (Emphasis ours.)

"DEFENDANT'S INSTRUCTION NO. 3

The indictment in this case is a mere accusation and is not of itself any evidence, not the slightest, of the defendant's guilt, and no juror should permit himself to be to any extent influenced because or on account of the indictment against the defendant. *You are instructed that the defendant is presumed by the law to be innocent of the crime charged against him, in each and all its parts, and this presumption shields and protects him throughout each and every stage of the trial until overcome by satisfactory evidence, which convinces you of his guilt as charged beyond all reasonable doubt.*" (Record pp. 10-11.) (Emphasis ours.)

"DEFENDANT'S INSTRUCTION NO. 4

Moreover, I instruct you that this presumption of innocence is not a mere form to be disregarded by you at pleasure, but it is an essential, substantial part of the law of the land, and is binding upon you in this case, and it is your duty to give the defendant the full benefit of this presumption and to acquit him unless, as I have already stated, the evidence satisfies you of his guilt beyond all reasonable doubt." (Record p. 11.)

"DEFENDANT'S INSTRUCTION NO. 7

Under the law no jury can convict a person charged with crime upon mere suspicion, however strong, or simply because there is a preponderance of all the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before a person can

be convicted of crime is not suspicion, not mere probabilities, *but proof which excludes all reasonable doubt of his innocence.*" (Record p. 12.) (Emphasis ours.)

The cases cited by Appellant are not in point and the conclusion that a "reasonable doubt" justifying an acquittal in a criminal action may be a "probable doubt" does not follow.

Solicitude for defendant's rights is only one-half of the story. Solicitude for the rights of the Territory has equal consideration and weight, thus the question is not one of solicitude for either party but of determining in this particular case whether or not reversible errors has been committed.

The fact that *Griggs v. United States,* 158 F 572, was decided by this Court in 1908 and *Louie Ding v. United States,* 246 F 80, was decided in 1917 does not affect the positive rule of law enunciated in each case.

In the recent case of *Mansfield v. United States,* 76 F (2d) 224, 230, the United States Circuit Court of Appeals for the Eighth Circuit held in 1935 that an instruction on reasonable doubt which contained the words " a doubt for which you could give a reason" did not constitute error.

To the same effect, see *Murphy v. United States,* 33 F (2d) 896; Certiorari denied, 280 U.S. 584, 50 S. Ct. 35, 74 L. Ed. 634.

In *Hopt v. Utah,* 120 U.S. 430, 439-441, 7 S. Ct. 614, 30 L. Ed. 708, the Supreme Court of the United States upheld an instruction on reasonable doubt which contained the words "*that a reasonable doubt is a doubt based on reason,* and which is reasonable in view of all the evidence." (Emphasis ours.)

This is very similar to the words objected to in Territory's Instruction No. 9.

In *Marshall v. United States,* 197 F 511, 512-513, Certiorari denied, 226 U.S. 207, 33 S. Ct. 112, 57 L. Ed. 379, the Court held that an instruction on reasonable doubt did not constitute error which contained the following:

"—A doubt that you can give a reason for if the court called on you to give one."

CONCLUSION

It is again respectfully submitted that the appellant has not shown that this Court has or should take jurisdiction of this case and that the trial court did not err in giving the jury Territory's Instruction No. 9 on reasonable doubt.

The error assigned is without merit and the judgment appealed from should be affirmed.

Dated at Honolulu, T. H., this 22nd day of November, A.D. 1946.

Respectfully submitted,

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Receipt of three copies of the foregoing brief is acknowledged this 22 day of November, A. D. 1946.

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